No. 93-

In The

Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1993

MICHAEL COURTNEY MARLOWE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

1. Whether the use of checklist, form affidavits that substitute boilerplate allegations for a description of the actual facts and circumstances which have prompted police to apply for a search warrant in a particular case is prohibited by the Fourth Amendment because such affidavits make it impossible for a magistrate to make an independent assessment regarding probable cause?

LIST OF PARTIES

The parties to the proceedings below were the United States of America, Michael Courtney Marlowe, Sonia Temika Hudson, Merrell Graham and Ronald Bridges. The parties before this Court on the instant petition are Michael Courtney Marlowe and the United States of America.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

MICHAEL COURTNEY MARLOWE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Michael Courtney Marlowe, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on May 18, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported; it is reprinted in the appendix hereto at p. A1-A14, infra. The opinion of the United States District Court for the Eastern District of Tennessee has not been reported. It is reprinted in the

appendix hereto at A15-A30, infra.

JURISDICTION

On April 3, 1991, Petitioner Michael Courtney Marlowe, along with codefendants Sonia Temika Hudson and Merrell Graham, were indicted by a federal grand jury in Knoxville, Tennessee for conspiring to distribute and to possess with intent to distribute cocaine hydrochloride and cocaine base in violation of 21 U.S.C. § 841(a)(1). On May 15, 1993, a superseding indictment was filed in the United States District Court for the Eastern District of Tennessee, Southern Division, charging Mr. Marlowe and Ms. Hudson and one Ronald Bridges with one count of conspiracy to distribute and to possess with intent to distribute cocaine hydrochloride and cocaine base [21 U.S.C. § 841(b)(1)(A) and 846], one count of possession of cocaine base with intent to distribute [21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)], one of count of possession of cocaine hydrochloride with intent to distribute [21 U.S.C. § 841(a)(1)]; and one count of possession of heroin with intent to distribute [21 U.S.C. §§ 841(a)(1)]. Mr. Marlowe was also charged with two counts of using or carrying a firearm during or in relation to a drug trafficking offense [18 U.S.C. § 924(c)] and one count of possessing a firearm after having been previously convicted of a felony. In addition, the final count of the indictment sought forfeiture, under 18 U.S.C. § 3665, of various firearms allegedly possessed by Mr. Marlowe and his codefendant, Ms. Hudson.

Mr. Marlowe timely filed a motion to suppress the firearms and narcotics that he was charged with having

possessed. He argued that the search warrant which purportedly authorized the search of the dwelling where the drugs and weapons were found was invalid because it was issued upon the basis of a form affidavit containing little more than boilerplate assertions, and hence, was completely lacking in any indicia of probable cause. In a memorandum and order dated July 5, 1991, the District Court denied this and other claims raised by Mr. Marlowe.

After the denial of his suppression motion, Mr. Marlowe plead guilty to conspiracy to distribute and to possess with intent to distribute cocaine hydrochloride and cocaine base and one count of using or carrying a firearm during or in relation to a drug trafficking offense. He also agreed to forfeiture of various firearms allegedly possessed by him and to cooperate with the government in its investigation of other crimes.

Judgement of conviction was entered in the District Court on May 19, 1992. Mr. Marlowe received a sentence of 262 months on his conspiracy conviction and a consecutive term of 60 months on the weapons offense.

Under the terms of his plea agreement Mr. Marlowe reserved the right to appeal the District Court's ruling upholding the sufficiency of the search warrant affidavit. In a decision rendered May 18, 1993, the United States Court of Appeals for the Sixth Circuit rejected Mr. Marlowe's challenge to the sufficiency of the search warrant affidavit and affirmed his conviction. Mr. Marlowe did not file a petition for rehearing.

Jurisdiction for this appeal exists under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S. Const., Amend. IV, Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

Michael Courtney Marlowe was arrested and charged with various narcotics and weapons offenses by local police officers executing a search warrant for 2111 Vaden Village Drive, a residence in Chattanooga, Tennessee, then occupied by Mr. Marlowe and his girlfriend, Sonia Temika Hudson. The search warrant was issued by a Chattanooga City Court Judge on the basis of a pre-printed form affidavit. This affidavit was reproduced in the opinion of the District Court, and is reprinted in the appendix hereto at A23-A25.

This form affidavit -- which assumes that the affiant will always have obtained his information from a citizen of the same state and county where the affiant is employed as a law enforcement officer -- consists of four sections. These various sections contain boilerplate assertions regarding the informant's reliability and the basis of the informant's knowledge as well as

boilerplate claims regarding the presence of "legend and/or narcotic drugs" at the place to be searched. Thus, to make this affidavit, a police officer need only check a few boxes and fill in a few blanks.

For example, Section One of the form affidavit provides several pre-printed assertions regarding the informant's reliability, which are designated Section A, B, and C respectively. Section A states that the informant has given the affiant "information in the past that has proven reliable." Section B declares that the informant has given the affiant's "fellow officers information in the past that has proven reliable." Section C contains a blank space where the affiant can fill in the number of years he has been acquainted with the informant and boilerplate language claiming that the affiant knows the informant "to be reliable, honest, credible and trustworthy."

Section One also contains a Section D. Section D begins with the words, "And/or," followed by a blank space where the affiant can fill in the name of his informant. In addition, Section D contains pre-printed language affirming that the informant has seen a person "who resides in or occupies and is in possession of . . . premises . . . located in . . . Hamilton County Tennessee," and that this person unlawfully possesses "on said premises legend and/or narcotic drugs . . . in violation of law made and provided in such places." There are blank spaces where the affiant can write (1) the name of the person who resides in, occupies or is in possession of the premises to be searched; (2) a description of the place to be searched; and (3) the particular "legend and/or narcotic drugs" -- allegedly possessed by the person who resides in, occupies or

is in possession of the premises to be searched.

Section Two of the affidavit contains a declaration that the informant was on the premises identified in Section One and "while there . . . saw legend and/or narcotic drugs . . . the same being on said premises in the possession and control of" the individual identified in Section One as residing in or occupying those premises. Section Two contains four blank spaces where the affiant can write in (1) how long ago, or the date on which, the informant was present on the premises to be searched; (2) the name of the person who resides in, occupies or is in possession of the premises to be searched; (3) the particular "legend and/or narcotic drugs" the informant observed; and (4) the name of the person who possessed the drugs.

Section Three states that the informant has advised the affiant that the informant "has seen persons going to and coming from" the location to be searched. There is also a boilerplate claim that such persons "are believed to be and known generally as users of legend and/or narcotic drugs." In addition, there is boilerplate language asserting that the premises described in Sections One and Two "is generally known as a place where legend and/or narcotic drugs . . . are unlawfully dispensed." Section Three contains two blank spaces where the affiant can identify (1) the particular "legend and/or narcotic drugs" used by those observed going to and coming from the location to be searched; and (2) the particular "legend and/or narcotic drugs" dispensed from this location.

Section Four begins with the declaration, "Affiant further states," followed by a blank space where the affiant -- should he be so inclined -- can provide in his own words any information supporting his request for a search warrant. Section Four ends with a request for permission to search the premises described in previous sections of the form affidavit -- as well as any individuals whose name the affiant writes in a blank space provided in this part of the form -- for "legend and/or narcotic drugs." There is also a blank space where the affiant can identify the particular "legend and/or narcotic drugs" which are the object of the search.

This form affidavit was completed in the instant case by Detective Randy Dunn of the Chattanooga Police Department. In the appropriate space in Section One, Dunn filled in the word, "**informant**," to indicate the source of his information and checked Sections A, B and C of Section One. In a blank space in Section C, Dunn also inserted, "**5 yrs.**," to indicate how long he had known the informant. Dunn did not check the box next to Section D. However, in this part of the form, he did write, "**Jane Doe (alias),**" in the space provided for identifying the person occupying, residing in or possessing the premises to be searched and penned the address, "**2111 Vaden Village Dr.**" in the space provided for a description of the premises to be searched. Dunn also wrote the word, "**cocaine**," in the blank provided for identifying the particular "legend and/or narcotic drugs" allegedly possessed at the premises to be searched.

In Section Two, Dunn inscribed, "**within the last 72 hrs.**," in the space provided for indicating the time frame in which the informant had made his observations. In the blank

spaces provided for identifying the resident, owner or occupier of the premises to be searched and in the blank space provided for identifying the person who had possessed "legend and/or narcotic drugs" on these premises, Dunn inserted, "**Jane Doe (alias).**" And, in the blank space provided for identifying the particular "legend and/or narcotic drugs" allegedly possessed at the premises to be searched, Dunn wrote the word, "**cocaine.**"

In Section Three, Dunn filled in the word, "**cocaine,**" in the blank space provided for identifying the particular "legend and/or narcotic drugs" believed to be used by the persons seen "going to and coming from" 2111 Vaden Village Drive and in the blank space provided for identifying the particular "legend and/or narcotic drugs" that were dispensed from this location.

Dunn left blank that part of Section Four that provided space for him to state in his own words his reasons for believing that there was probable cause to search 2111 Vaden Village Drive. He merely inserted the words, "**Jane Doe (alias),**" in the blank provided for identifying the person to be searched and, "**cocaine,**" in the space provided for identifying the particular "legend and/or narcotic drugs" that were the object of the search.

Prior to trial, Mr. Marlowe moved to suppress the fruits of the search of 2111 Vaden Village Drive.[1] He noted that the

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[1] The items found during the search included currency, 10.4 grams of heroin, 117 grams of crack cocaine, 456.3 grams of cocaine powder, a set of scales and cutting agents for the narcotics, and .44 and .357 revolvers. In addition, various papers were found.

boilerplate allegations contained in the pre-printed form affidavit provided no facts or circumstances that would have enabled the City Court Judge to independently assess the credibility and reliability of Detective Dunn's informant. Mr. Marlowe maintained that this omission was fatal because the sole predicate for the search was the informant's uncorroborated claim regarding the presence of narcotics at 2111 Vaden Village Drive and, consequently, an assessment of the informant's veracity and reliability were critical to any probable cause determination.

Marlowe also argued that, notwithstanding its boilerplate claim regarding the presence of drugs at the premises to be searched, the form affidavit actually raised substantial doubts as to the basis of the informant's knowledge. Marlowe contended that Dunn's reference to the person who allegedly possessed drugs at 2111 Vaden Village Drive as "Jane Doe (alias)" and his failure to provide even a simple physical description of this transgressor strongly suggested that the informant was not a very observant or reliable source of information.[2] In addition, Marlowe observed that the boilerplate assertion that Dunn's informant was a "responsible citizen" was completely incongruous with the representation that this person was present at a location allegedly frequented by

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[2] The warrant affidavit was not limited to a request for permission to search 2111 Vaden Village Drive; it also sought authorization to search the person of "Jane Doe (alias)." Thus, Dunn had every reason to include a physical description of "Jane Doe (alias)." Indeed, such a description was critical if law enforcement officers executing the search warrant were to identify and search "Jane Doe (alias)."

drug users and from which illicit drugs were allegedly dispensed.

Finally, Mr. Marlowe maintained that no reasonable police officer could have relied in good faith upon a search warrant obtained with the form affidavit that Detective Dunn had submitted to the City Court Judge. Marlowe contended that, since the form affidavit reduced the City Court Judge to a virtual rubber stamp and precluded him from making an independent assessment of probable cause, it would be completely disingenuous to suggest that law enforcement officers had relied in good faith upon a probable cause determination made by the City Court Judge.

In response to Mr. Marlowe's arguments, the government maintained that the form affidavit established "a substantial basis" for a belief that illegal drugs would be found at 2111 Vaden Village Drive and hence the search warrant was properly issued. However, the government also requested permission to present evidence that Detective Dunn and his fellow officers had relied in good faith upon the warrant issued upon the form affidavit. Consequently, at an evidentiary hearing, Detective Dunn testified that he and his fellow officers had used the form affidavit in other cases. Dunn stated that, to the best of his knowledge, no court had ever found a search warrant invalid because it was obtained with this form affidavit.

The District Court conceded that the form affidavit -- at least as it was completed by Detective Dunn -- was "sparse as to detail," and it found this "paucity of detail . . . troubling" (A26). Nonetheless, the District Court was ultimately unable to conclude that there was not a "substantial basis" for the

issuing judge to find a "probability that criminal activity was occurring" at 2111 Vaden Village Drive (A26). According to the District Court, this "substantial basis" consisted of Detective Dunn's sworn assertion that his informant "had been reliable in the past, both to him and other officers," and the fact that Dunn had given the City Court Judge the "name of the informant, a description of the place to be searched the item sought and the basis for this information" (A26).[3] Alternatively, the District Court found, even if the affidavit were lacking in probable cause, Detective Dunn and his fellow officers were entitled to rely upon a form affidavit which had been in use for many years (A26-A27).

In his appeal to the Sixth Circuit, Mr. Marlowe renewed his argument that the form affidavit utilized to obtain the search warrant for 2111 Vaden Village Drive had reduced the City Court Judge to a virtual rubber stamp. Noting that the informant's claim regarding the presence of illegal drugs at 2111 Vaden Village Drive was the sole predicate for the search warrant, Marlowe observed that information regarding the informant's credibility and reliability was critical to any assessment as to the existence of probable cause. But, the boilerplate, form affidavit submitted by Detective Dunn denied

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[3] There is no support in the record for the District Court's claim that the affidavit contained a description of the place to be searched and the item sought. To the contrary, the form affidavit contains no description of the premises identified as 2111 Vaden Village Drive. Similarly, the affidavit contains nothing more than a general reference to "legend and/or narcotic drugs including cocaine." It does not even describe a particular quantity of drugs or state where they are likely to be found within 2111 Vaden Village Drive.

the City Court Judge the facts necessary to determine for himself whether Detective Dunn's professed faith in the trustworthiness of his informant was justified. Moreover, the affidavit was devoid of any other indicia of reliabilty which would compensate for this deficieny or allow the magistrate to evaluate the quality of the informant's tip. Mr. Marlowe also renewed his argument that law enforcement officers could not claim reasonable reliance upon a search warrant issued on the basis of an affidavit that precluded the issuing magistrate from making an independent assessment of probable cause.

The Sixth Circuit found that the form affidavit submitted by Detective Dunn provided the City Court Judge with a "substantial basis" for concluding that controlled substances would be found at 2111 Vaden Village Drive because the affidavit alleged (1) that Dunn's informant had provided accurate information in the past; (2) that the informant had seen cocaine at 2111 Vaden Village Drive within 72 hours before the affidavit was presented to the City Court Judge; and (3) that the affiant had seen known cocaine users going to and coming from the premises (A5). The Sixth Circuit noted, moreover, that "the mere fact that many of the allegations are in pre-printed form does not by itself undercut the finding of probable cause" (A6). And, the Sixth Circuit added that, even if the warrant "were lacking in probable cause," it would still affirm the denial of the motion to suppress because "the Chattanooga police relied in good faith upon a facially valid warrant" (A6).

REASONS FOR GRANTING THE WRIT

I. Because pre-printed form affidavits like those condoned by the Sixth Circuit in the instant case thwart a magistrate's ability to make an independent assessment of probable cause, they threaten to nullify an essential Fourth Amendment protection; therefore, a Writ of Certiorari should issue

"[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances that threshold may not reasonably crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980). Yet Chattanooga police officers were able to obtain a search warrant for a man's home simply by filling in the blanks in a one-page, pre-printed form affidavit that consisted mostly of boilerplate conclusory assertions. This apparently routine use of a generic search warrant affidavit strongly suggests that police officers can easily circumvent the constitutional requirement that a magistrate determine for himself whether police have met the constitutional requirements for entry into a person's home. Because the Sixth Circuit not only failed to address this problem but condoned the use of search warrant affidavits containing boilerplate allegations, a Writ of Certiorari should issue so that this Court may address this critical issue of Fourth Amendment jurisprudence.

The essential protection of the warrant clause of the Fourth Amendment is a guarantee that a neutral detached magistrate -- and not police officers engaged in the competitive enterprise of ferreting out crime -- will decide whether there exist sufficient indicia of criminal activity to warrant invading

the privacy of a citizen's home. *Illinois v. Gates,* 462 U.S. 213, 240 (1983); *Steagald v. United States,* 451 U.S. 204, 216 (1981); *Giordenello v. United States,* 357 U.S. 489, 486 (1958); *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). Moreover, it is a fundamental tenet of Fourth Amendment jurisprudence that the magistrate "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause." *Giordenello v. United States,* 357 U.S. at 486. *See also Aguilar v. Texas,* 378 U.S. 108, 112-114 (1964); *Nathanson v. United States,* 290 U.S. 41, 47 (1933) (probable cause must be judged by magistrate and not by police officers). "[H]is action cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates,* 462 U.S. at 239.

As this Court observed in *McDonald v. United States,* 335 U.S. 451 (1948), the requirement of a search warrant issued by a neutral detached magistrate is not a mere formality. The presence of a search warrant:

> serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

McDonald v. United States, 335 U.S. at 455-56.

Yet pre-printed form affidavits of the sort utilized in the instant case threaten ultimately to render the requirement of a search warrant for a home a mere formality by eliminating the magistrate's role as an independent arbiter of probable cause. Boilerplate allegations carefully crafted to suggest the existence of probable cause effectively preclude magistrates from examining the facts and circumstances of particular cases. Indeed, the form affidavit utilized by Detective Dunn to obtain a search warrant for 2111 Vaden Village Drive graphically demonstrates how boilerplate allegations effectively deny magistrates the facts they need to make an independent assessment of probable cause and force them instead to rely upon the conclusions of police officers.

Stripped of its boilerplate, Dunn's affidavit provides scant information for a probable cause determination. At best, the affidavit relates a bald accusation that an informant saw some unspecified amount of cocaine in the possession of an unidentified woman at a particular address at some unspecified time within three days prior to the time Dunn submitted the warrant application. Inasmuch as this cocaine might have been a small amount that could have been easily consumed or dispensed by "Jane Doe (alias)" before Dunn had even completed the affidavit, the warrant provided no facts that would have entitled the City Court Judge to conclude that cocaine would be present at 2111 Vaden Village Drive when Dunn applied for the search warrant.

The affidavit provides not even a clue how the informant came by his information. What a person whom the

affidavit dubs a "responsible" citizen was doing at a location where drugs and drug users were to be found is left an unsolved mystery. How or why "Jane Doe (alias)" decided to engage in criminal activity -- i.e., the possession of illegal narcotics -- in the informant's presence is also left unexplained.

Dunn's affidavit is deficient not only as to the basis of the informant's knowledge. Although the form provided Dunn with ample space to state his reasons for crediting the informant's bald accusation as trustworthy, Dunn chose to rely upon boilerplate allegations regarding the informant's reliability. This boilerplate language is woefully inadequate.

For example, Section One of the form affidavit submitted by Detective Dunn contains three different pre-printed assertions regarding the informant's reliability. Section A is nothing more than a conclusory assertion that the informant had given Dunn "information in the past that has proven to be reliable." Section B, a declaration that the informant had given Dunn's "fellow officers information in the past that has proven to be reliable," is equally conclusory. And, Section C, a blanket assertion that Dunn knew the informant "to be reliable, honest, credible, and trustworthy," is no more specific. The affidavit does not indicate how Dunn and his colleagues determined that information previously provided by the informant was "reliable." It does not state whether this information resulted in the discovery or seizure of narcotics or led to the arrest and conviction of individuals involved in illegal narcotics activity. It does not even state that the information previously provided by the informant related to criminal activity.

This Court has traditionally found such conclusory claims regarding an informant's reliability insufficient to permit a magistrate to make an independent assessment as to the existence of probable cause. For example, in *Spinelli v. United States*, 393 U.S. 410, 416 (1969), this Court held that a magistrate could not issue a warrant premised, in part, upon information from a confidential informant, when the affiant asserted only that his informant was reliable:

> It is clear that a Commissioner could not credit [the informant's information] without abdicating his constitutional function. Though the affiant swore that his confidant was "reliable," he offered no reason in support of that conclusion.

Similarly, in *Aguilar v. Texas*, 378 U.S. at 109, this Court held that an affiant's assertion that he had received "reliable information from a credible person" did not provide the magistrate with sufficient facts to determine for himself whether the informant was reliable and credible. Thus, it would be completely disingenuous to suggest that the form affidavit submitted by Detective Dunn provided the Chattanooga City Court Judge with sufficient facts to determine for himself the veracity and credibility of Dunn's informant.

Indeed, the failure of the Sixth Circuit and the District Court to acknowledge that Dunn's form affidavit was ultimately useless to a magistrate trying to assess for himself the existence of probable cause is particularly troubling. It suggests that these courts failed to comprehend either the magistrate's role as an independent arbiter of probable cause or the standard a magistrate must employ in making a probable cause determination.

For example, the Sixth Circuit's answer to Mr. Marlowe's comments regarding the boilerplate allegations concerning informant's reliability was to declaim that *Illinois v. Gates*, 462 U.S. at 213, eliminated the rigid two-prong test of *Aguilar* and *Spinelli*. But, such factors as an informant's basis of knowledge and his credibility and veracity still remain as relevant criteria under *Gates*.

In fact, *Gates* presumes that an affidavit lacking sufficient facts to establish an informant's reliability or the basis of his knowledge must at least contain "other indicia of reliability" that compensate for this deficiency. *Illinois v. Gates*, 462 U.S, at 233 (under totality of circumstances test a deficiency in either the basis or knowledge or veracity prong of the *Aguilar-Spinelli* test "may be compensated by a strong showing as to the other, or by some other indicia of reliability"). Because Dunn's affidavit is bereft of other indicia of reliability to compensate for his failure to set forth sufficient facts establishing the informant's reliability and the basis of his knowledge, it is not apparent how the Sixth Circuit could have rationally concluded that the affidavit provided a substantial basis for a finding of probable cause. Perhaps, the time has come for this Court to provide some guidance as to precisely what constitutes "other indicia of reliability" that will support a finding of probable cause despite the absence of sufficient facts to establish an informant's reliability or the basis of his knowledge.

Yet even the most detailed set of bright line rules will not suffice to protect Fourth Amendment values unless courts are sensitive to the critical function that a magistrate plays in

the warrant process. In this case, the Sixth Circuit made a point of explicitly condoning the boilerplate claims contained in Dunn's pre-printed form affidavit, observing that the use of boilerplate did not undercut a finding of probable cause. This observation is especially disturbing because it is self-evident that form affidavits like Dunn's have a tremendous potential for abuse and pose a real and substantial threat to the integrity of the warrant process.

Mr. Marlowe does not contend that every search warrant premised upon an form affidavit is necessarily invalid. If, for example, the affiant includes in a form affidavit all the facts necessary to permit the issuing magistrate to make an independent determination of probable cause, any search warrant issued on that affidavit would be valid. Furthermore, if a form were to force a police officer to disclose the facts that have prompted him to seek a search warrant in a particular case, it might actually aid the magistrate in making an independent assessment of probable cause. However, because probable cause depends on particular facts, it is highly unlikely that a standardized form will be of much use in this context. Moreover, Detective Dunn's failure to complete those portions of the form affidavit that provided him with an opportunity to set forth the particular facts of his case demonstrates the simple human truth that forms create too great a temptation for police officers to rely on pre-printed boilerplate allegations.

Indeed, form affidavits encourage police officers to provide the magistrate with as little information as possible. Police officers are hardly likely to go through the trouble of reciting the specific facts and circumstances that have caused

them to seek a warrant in a particular case if they can simply check off a few boxes and fill in a few blanks. Thus, because they effectively encourage police officers to withhold information from a magistrate, boilerplate, form affidavits are incongruous with this Court's longstanding policy of encouraging police officers to seek the guidance of a magistrate before executing a search. *See Illinois v. Gates,* 462 U.S. at 236 (Fourth Amendment embodies a strong preference for searches conducted pursuant to a warrant).

Form affidavits also encourage a lack of candor and police perjury. "[P]robable cause is a fluid concept -- turning on the assessment of probabilities in particular factual contexts." *Illinois v. Gates,* 462 U.S. at 232. Thus, it is unlikely that a form affidavit filled with boilerplate assertions will ever accurately reflect the factual subtleties inherent in a particular case. Inevitably the use of a form affidavit will misrepresent at least some of the actual facts in a particular case. Moreover, in certain instances, the invocation of boilerplate assertions will constitute little more than tailoring the real facts of a particular case to create probable cause.

However, the chief vice inherent in boilerplate, form affidavits is that they make police officers the ultimate arbiter of probable cause. The Fourth Amendment requires a magistrate to judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause and not serve merely as a rubber stamp for the police. *United States v. Leon,* 468 U.S. 897, 914 (1984); *Giordenello v. United States,* 357 U.S. at 486; *Aguilar v. Texas,* 378 U.S. at 112-114. But, conclusory statements give a magistrate "virtually no basis at all

for making a judgment regarding probable cause." *Illinois v. Gates,* 462 U.S. at 239. Thus, a magistrate cannot issue a warrant on the basis of boilerplate assertions or conclusory claims regarding the existence of probable cause without, in effect, relinquishing his constitutional duty to find probable cause from facts or circumstances presented to him under oath or affirmation.

If permitted to go unchecked, the use of pre-printed, form affidavits that rely heavily on boilerplate allegations will essentially permit law enforcement officers to circumvent meaningful judicial review of search warrant applications. Indeed, it is ironic that both the District Court and the Sixth Circuit, as an alternative basis for denying Mr. Marlowe's suppression motion, held that Detective Dunn and his colleagues could have reasonably relied upon a warrant obtained with an affidavit that made it impossible for the Chattanooga City Court Judge to make an independent assessment of probable cause. Dunn and his colleagues cannot claim in good faith reliance that they relied upon a probable cause determination made by the City Court Judge when the very means by which they procured the warrant denied the judge the facts necessary to make an independent probable cause determination.[4]

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[4] Dunn's testimony that he had used the checklist affidavit previously and that he was unaware of any court that had ruled the form invalid was not sufficient to establish "good faith" reliance on the clearly invalid search warrant. *United States v. Leon,* 486 U.S. at 920, n. 20, establishes an objective standard which "requires officers to have a reasonable knowledge of what the law prohibits." That Dunn or his colleagues had never heard of judge invalidating a warrant issued upon the form affidavit is irrelevant. A

To recapitulate, the Fourth Amendment provides that a search warrant shall issue only after a magistrate has made an independent assessment of probable cause. As Mr. Marlowe's case demonstrates, this constitutional safeguard can easily be rendered meaningless through the use of form affidavits that substitute pre-printed, boilerplate, conclusory allegations for a candid discussion of the actual facts of a particular case. Therefore, a Writ of Certiorari should issue so that this Court may address this critical issue of Fourth Amendment jurisprudence.

CONCLUSION

For the above-stated reasons, this petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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Counsel for Petitioner

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reasonable police officer is charged with knowledge of the rudimentary principle that a search warrant affidavit must present a magistrate with sufficient facts to make an independent assessment of probable cause, and the inadequacy of the form affidavit was patently evident.

Opinion and Order of the Sixth Circuit

No. 92-5680

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL COURTNEY MARLOWE
Defendant-Appellant.

BEFORE: RYAN and **SUHRHEINRICH**, Circuit Judges; and **BROWN**, Senior Circuit Judge.

PER CURIAM. Defendant Michael Marlowe appeals his convictions and sentence to this Court alleging that numerous errors require reversal. For the reasons stated below, we **AFFIRM** the district court.

I

On March 20, 1991, Detective Randy Dunn, a Chattanooga Police Narcotics Officer, and several other Chattanooga police officers executed a search warrant at the apartment of Sonia Hudson. When the police approached Hudson's door, they heard several occupants running around

inside the apartment and heard the term "bumrush."[1] The police forced their way into the apartment house because, they said, they were afraid evidence might be destroyed. They found Marlowe standing by a window in the back bedroom holding a loaded nine millimeter pistol. He dropped the pistol when he saw the police and was then arrested and searched. The search revealed a pager, $4,000 in U.S. currency, and 10.4 grams of 94% pure heroin. A search of the apartment revealed .44 and .357 magnum revolvers. The police also discovered 117 grams of crack cocaine, 456.3 grams of cocaine powder, a set of scales, cutting agents, and ledgers that allegedly document drug transactions.

On May 15, 1991, a federal grand jury returned an eight-count indictment charging Marlowe and three others with narcotics trafficking offenses and firearm offenses. Specifically, Marlowe was charged with conspiracy to distribute and possess with intent to distribute cocaine hydrochloride and cocaine base; possession of heroin, cocaine base and cocaine hydrochloride with intent to distribute them; carrying a firearm during the commission of a drug offense; and possession of a firearm by a felon. An additional count sought forfeiture of Marlowe's weapons.

Marlowe filed a motion to suppress the cocaine and the weapons, arguing that the search warrant was not supported by probable cause, that the police exceeded the scope of the

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[1] The term "bumrush" is a slang term commonly used in Chattanooga to refer to a narcotics raid. The term "bumrushers" refers to narcotics officers themselves.

warrant when conducting their search, and that the police did not comply with the knock and announce requirement of 28 U.S.C. § 3109. After a two-day suppression hearing, the district court denied the motion to suppress.

On June 29, 1991, pursuant to a written plea agreement, Marlowe pled guilty to Count 1 of the indictment, the conspiracy count, Count 4, which charged him with carrying a firearm during the commission of a drug offense, and Count 8, which permitted forfeiture of Marlowe's firearms. Marlowe also agreed to cooperate fully with the government in its investigations of other suspected narcotics traffickers. In exchange, the government agreed to dismiss the other count against him and to bring to the district court's attention at the time of sentencing the "nature, extent, and value" of Marlowe's cooperation. The government also agreed to permit him to pursue his motion to suppress the controlled substances and the firearms before the district court and before any appellate courts.

The case was initially set for sentencing on September 30, 1991, but the sentencing hearing was rescheduled three times to permit Marlowe to comply with the provision of the plea agreement requiring his cooperation. Sentencing was set for the fourth time for May 19, 1992. Just before the hearing, Marlowe's lawyer attempted to have the sentencing hearing postponed yet again to allow Marlowe to continue his cooperation but, over Marlowe's objections, the district court refused to delay sentencing further. The district court then sentenced Marlowe to a term of 262 months on Count 1, the minimum possible sentence under the Guidelines, plus five

years on the firearm count. The terms are to be served consecutively, as required by statute, for a total term of 322 months. 18 U.S.C. § 924(c) (1988). The defendant then perfected a timely appeal to this court, attacking the denial of his motion to suppress, the denial of his motion to continue the sentencing, and the refusal of the government to move for a § 5K1.1 downward departure.

II

Marlowe first contends that the affidavit used by Detective Dunn to obtain the search warrant precluded the City Court judge from making an independent determination of probable cause because it contained preprinted, conclusory allegations regarding the reliability and credibility of the informant.

To support this argument, Marlowe relies in part on upon *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli v. United States,* 393 U.S. 410 (1969). Under *Aguilar* and *Spinelli,* a search warrant affidavit based upon an informant's tip had to include: 1) information on the credibility or reliability of the informant; and 2) information detailing "some of the underlying circumstances from which the informant" obtained the information. *United States v. Pelham,* 801 F.2d 875, 877 (6th Cir. 1986) (quoting *Aguilar,* 378 U.S. at 114), *cert. denied,* 479 U.S. 1092 (1987).

In *Illinois v. Gates,* 462 U.S. 213 (1983), however, the Supreme Court rejected the rigid Aguilar-Spinelli test in favor of a new totality of the circumstances approach. *Id.* The *Gates* Court held that the two elements from *Aguilar-Spinelli* are a

"relevant consideration" used to illuminate "the commonsense practical question" of whether there is probable cause to believe that contraband or evidence of a crime will be found in a particular place." *Gates,* 462 U.S. at 238. A weak showing under one prong "can be compensated for . . . by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233. Thus, the inquiry for an issuing magistrate or judge is whether a practical, commonsense evaluation of the totality of the circumstances presented in the materials supporting the application for a search warrant gives rise to a fair probability that evidence of a crime or contraband will be found in the place to be searched. *Id.* at 233, 238.

Reviewing courts must give the probable cause determinations of issuing judges and magistrates, "great deference." *Pelham,* 801 F.2d at 877. Thus, an appellate court does not review *de novo* a magistrate's probable cause determination. *Gates,* 462 U.S. at 236. Rather, the task of a reviewing court is to "ensure that the magistrate had a 'substantial basis for . . . conclud[ing] that a search would reveal evidence of wrongdoing.'" *Id.* at 238.

In this case the affidavit states, albeit in boilerplate form, that the confidential informant has provided accurate information in the past. The affidavit also alleged that the informant saw cocaine in Hudson's apartment within 72 hours of the presentation of the affidavit to the City Court judge. The affidavit further alleges, again in boilerplate form, that the informant has seen known cocaine users going to and coming from the premises.

As the *Gates* Court stated, "affidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation" and should be interpreted in a "commonsense" rather than a "hypertechnical" manner. *Gates,* 436 U.S. at 235-36; *Pelham,* 801 F.2d at 878. If we interpret Dunn's affidavit in a commonsense manner, it is apparent that the City Court judge had a substantial basis for concluding that controlled substances would be discovered at Hudson's apartment. Further, the mere fact that many of the allegations are in preprinted form does not, by itself, undercut the finding of probable cause. Thus, Marlowe's argument that the affidavit does not support a finding of probable cause is meritless.

Even if we found that the warrant were lacking in probable cause, however, we would still have to affirm the denial of the motion to suppress because we believe that the Chattanooga police relied in good faith upon a facially valid warrant. *United States v. Leon,* 468 U.S. 897 (1984).

III

Marlowe next contends that the district court should have granted him a hearing pursuant to *Franks v. Delaware,* 438 U.S. 154 (1978), to determine whether Dunn fabricated the existence of his informant.

In *Franks,* the Supreme Court held that an affidavit supporting a search warrant is entitled to a presumption of validity; however, the defendant is entitled to a hearing on the veracity of the affidavit if he makes specific allegations of deliberate falsehood or reckless disregard for the truth on the part of the affiant (not the informant) and supports these

allegations with an offer of proof. *Id.* at 171. The offer of proof must consist of affidavits or sworn or "otherwise reliable statements" that support the contention that the affiant deliberately or recklessly falsified information in the affidavit. *Id.* If the defendant does not produce such sworn or reliable statements, their absence must be satisfactorily explained. *Id.*

In the case at bar, Marlowe did not allege that the affidavit contained false statements until the beginning of the suppression hearing. His motion to suppress contained two allegations: 1) that Dunn's affidavit on its face did not support a finding of probable cause; and 2) that the warrant was improperly executed. Since Marlowe did not make specific allegations regarding the falsity of the affidavit and did not make an offer of proof, the district court was correct to deny Marlowe a *Franks* hearing.

Nevertheless, Marlowe now contends that the evidence elicited during the suppression hearing amounts to an offer of proof which required the district court to give him a *Franks* hearing. We also reject this contention. The testimony on which Marlowe relies is that of Sonia Hudson and Special Agent John Scott, a federal agent. Even if we considered their testimony as an offer of proof, Marlowe still is not entitled to a *Franks* hearing because their testimony does not establish that Dunn fabricated the existence of the confidential informant: Hudson admitted at the suppression hearing that she had cocaine in her apartment and that Marlowe sold this cocaine to an unknown person approximately 72 hours before the search warrant was executed. Moreover, the district court conducted an *in camera* interview of Detective Dunn and was satisfied that

Dunn did not fabricate the existence of the informant.[2]

Marlowe contends, however, that in cases involving confidential informants, it is difficult for the defendant to make the offer of proof because the defendant cannot interview a confidential informant to determine if the affiant is lying. Therefore, he contends, under *Franks*, he need not make a more detailed offer of proof than he made because his inability to question the confidential informant is a satisfactory explanation for the absence of proof that the affiant lied.

Although Marlowe is correct that it is impossible for defendants to present affidavits from unknown confidential informants, he could have obtained affidavits from other persons involved in the case to prove that Dunn was lying, or that the information in the affidavit was wrong. Then perhaps he might have been entitled to a *Franks* hearing to the extent that he did not receive one. But he has not even presented evidence that information contained in the affidavit was untrue. Thus, we conclude that the district court did not err in refusing to give Marlowe a *Franks* hearing to the extent that he did not receive one.

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[2] Further, at the suppression hearing, the district court gave Marlowe a considerable amount of latitude in questioning witnesses regarding the veracity of the allegations contained in the affidavit. A fair reading of the record of the suppression hearing indicates that it substantially amounted to a *Franks* hearing.

IV

Marlowe next contends that the manner in which the Chattanooga police entered Hudson's apartment was unreasonable and violated the Fourth Amendment and 18 U.S.C. § 3109 (1988). At the outset, it must be noted that § 3109 may not even apply to the actions of the Chattanooga police. Indeed, although the controversy in the district court centered around § 3109, the government contends before this court that the Fourth Amendment restrictions rather than the more stringent requirements of § 3109 should apply. Since the district court relied upon § 3109 and the government did not object to its doing so, this court will apply § 3109 to this issue.[3]

Section 3109 authorizes officers executing search warrants to break down a door to execute a search warrant if, after they knock and announce their purpose, they are refused entry. 18 U.S.C. § 3109 (1988). The officer is also justified in forcing his entry when exigent circumstances exist. *United States v. Singer*, 943 F.2d 758 (7th Cir. 1991); *United States v. Harris*, 713 F.2d 623 (11th Cir. 1983).

This court reviews the district court's determination that the requirements of § 3109 were met under the clearly erroneous standard. *United States v. Gonzalez*, 697 F.2d 155, 157 (6th Cir. 1983) (per curiam). "To be clearly erroneous . . . a decision must strike [the court] as wrong with the force of

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[3] While we do not, because it did not so contend below, resolve the government's contention on appeal that § 3109 does not apply to these local officers, we recognize that is has been held in other circuits that § 3109 does not apply. *See, e.g., United States v. Moore*, 956 F.2d 843, 846 (8th Cir. 1992).

a five-week-old, unrefrigerated dead fish." *United States v. Perry*, 908 F.2d 56, 58 (6th Cir. 1990) (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989)), *cert. denied*, 498 U.S. 1002 (1990).

The findings of the district court are adequately set out in section I of this opinion above. A careful review of the record indicates that these findings are not clearly erroneous. Accordingly, we conclude that this argument has no merit.

V

Marlowe next contends that the government violated the plea agreement when it refused to file a motion for a U.S.S.G. § 5K1.1 downward departure to compensate Marlowe for his cooperation up to the time of sentencing.

This court has held that plea agreements are contractual in nature and must be interpreted in the manner of contracts. *United States v. Johnson*, 979 F.2d 396, 399 (6th Cir. 1992). Paragraph 6 of the agreement provides:

> At the time of sentencing the United States agrees to bring to the Court's attention the nature, extent, and value of the defendant's cooperation. This information will be provided to the Court so that it may be considered in determining a fair and appropriate sentence under the facts of the case.

J.A. at 47.

Thus, paragraph 6 only required the government to point out to the court at the time of sentencing the extent of Marlowe's cooperation. It did not require the government to

file a motion for downward departure under U.S.S.G. § 5K1.1. Since the plea agreement did not require the government to file the § 5K1.1 motion, the decision to move the court for a downward departure lies within the discretion of the prosecutor, *Wade v. United States*, 112 S.Ct. 1840, 1843-44 (1992), and only if the prosecutor's decision not to file a motion for a § 5K1.1 downward departure is based upon an unconstitutional motive can this court provide relief for the defendant. *Id.* Marlowe has not even attempted to show that the government's failure to file a motion for a downward departure was based upon unconstitutional motives. Thus, his argument is meritless.

VI

Marlowe next contends that the district court should have continued his sentencing hearing until he completed his cooperation. Rule 32(a)(1) of the Federal Rules of Criminal Procedure permits the district court to delay sentencing where a factor important to sentencing has not been resolved. Fed. R. Crim. P. 32(a)(1). One such factor can be cooperation by the defendant. Both parties agree that the district court's refusal to grant the continuance is reviewed under an abuse of discretion standard.

We conclude that the district court did not abuse its discretion when it refused to continue, for the fourth time, Marlowe's sentencing hearing. First, the court took into account Marlowe's cooperation when it set his sentence at the low end of the Guidelines range in recognition of his cooperation up to the time of sentencing. Second, the court had already waited almost a year after Marlowe had entered his

guilty plea to sentence him. Third, under Federal Rule of Criminal Procedure 35, the government can move the district court to reduce his sentence up to one year after sentencing if Marlowe cooperates further. Finally, the government and the district court indicated at a conference before the sentencing hearing that Marlowe could withdraw his guilty plea if he felt that he was being sentenced prematurely.

Marlowe contends, however, that waiting for the government to make a motion pursuant to Rule 35 may visit an injustice on him. He contends that Rule 35 could be read to permit the court to consider assistance that he has rendered only after imposition of the sentence. Thus, he contends, his cooperation prior to imposition would not be recognized. This argument is spurious in the instant case because the district court gave Marlowe the minimum possible under the Guidelines because of his cooperation up to the time of sentencing.

VII

We **AFFIRM** the judgment of the district court.

RYAN, Circuit Judge, concurring separately. While I concur in the result reached in the majority opinion and the judgment to be entered, I respectfully disagree with the approach the court has taken in the issue addressed in part IV of the majority opinion.

My brothers are satisfied to resolve the defendant's challenge to the lawfulness of the search of his apartment by affirming the district court's determination that the search was not unreasonable under the Fourth Amendment and did not violate 18 U.S.C. § 3109. While acknowledging that section 3109 "may not even apply to the actions of the Chattanooga police," the court agrees to decide whether its terms were violated in this case because "the district court relied upon § 3109 and the government did not object to its doing so . . . "

Although we do not, as a general rule, resolve issues on appeal that are not first raised in the lower court -- and the applicability of section 3109 to a search conducted by state officers was not raised in the lower court -- that does not mean to me that this court is obligated to apply a federal statute to a state law enforcement action when it is plainly inapplicable. In my judgment, it is plain that section 3109 is inapplicable to searches conducted by state law enforcement officers.

First, of all, 18 U.S.C. § 3109 is manifestly a federal statute. Nothing in its language purports to suggest that it is applicable to enforcement actions taken by state officers. Moreover, in *United States v. Moore,* 956 F.2d 843 (8th Cir. 1992), the court stated that section 3109 governs only "the

permissible scope of . . . searches by federal law enforcement officers." A majority of federal courts that have addressed the issue have reached the same conclusion. *See United States v. Mitchell,* 783 F.2d 971, 973-74 (10th Cir.), *cert. denied,* 479 U.S. 860 (1986); *United States v. Andrus,* 775 F.2d 825, 844 (7th Cir. 1985); *Simons v. Montgomery County Police Officers,* 762 F.2d 30, 32, n. 1, (4th Cir. 1985), *cert. denied,* 474 U.S. 1054 (1986); *United States v. Jefferson,* 714 F.2d 689, 693 (7th Cir. 1983); *United States v. Valenzuela,* 596 F.2d 824, 829-30 (9th Cir.), *cert. denied,* 441 U.S. 965 (1979); *United States v. Doust,* 728 F.Supp. 41, 47 (D. Me. 1989), *aff'd,* 916 F.2d 757 (1st Cir. 1990). *But see, King v. Marmon,* 793 F.Supp. 1030 (D. Kan. 1992).

Although in the ordinary case I would not be willing to address an issue raised for the first time on appeal, I think this case is an appropriate exception to that rule. We should not be seen as acquiescing in the patently erroneously application of a federal statute to state law enforcement action simply because the lower court did so and the government failed to object.

I am satisfied that the legitimacy of the search of the defendant's apartment should be tested against the settled principles of Fourth Amendment search and seizure law, and that so tested, the search here was not unreasonable.

For those reasons, and because I concur in the balance of the majority opinion, I shall join in the judgment affirming the conviction and sentence below.

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

UNITED STATES OF AMERICA

v. CR-1-91-34

MICHAEL COURTNEY MARLOWE, also known as MICHAEL A. MOORE, also known as MICHAEL HUDSON, also known as RONALD E. WASHINGTON

MEMORANDUM AND ORDER

This matter is before the Court upon the motion of Defendant Ronald E. Washington, also known as Michael Courtney Marlowe, Michael A. Moore and Michael Hudson ("defendant" or "Washington") to suppress the following items as fruits of an unlawful search and seizure:

1. Cocaine or crack cocaine;
2. $7,463.00 in currency;
3. Scales;
4. Assorted papers;
5. Nine millimeter semi-automatic pistol;
6. .44 Magnum revolver; and
7. .357 caliber revolver.

(Court File No. 38). For the reasons expressed on the record

and as set forth herein, the defendant's motion is hereby **DENIED**.

Defendant Washington in this case has alleged various grounds for suppressing the above-listed items seized during the search of 2111 Vaden Village Drive pursuant to a warrant.[1] The reasons fall into two general categories. First, the defendant claims that there was not sufficient probable cause to issue the search warrant in this case. Under this theory, the defendant seeks to have the identity of the Government informant revealed; he attacks the truthfulness of Officer Randy Dunn's affidavit made in support of the warrant; and he attacks the form warrant for failing to sufficiently specify the informant's reliability and motive for coming forward and sufficient details about the object of the search, *e.g.*, where the drugs were seen, the amount, who possessed them, when seen and when the informant was at the premises. Second, the defendant attacks the way in which the warrant was executed. Specifically, he challenges the officers executing the warrant at night instead of daytime; failing to knock and announce before entering; conducting strip searches of all persons present; and seizing objects not set forth in the warrant including weapons and personal papers. The Court will address the issues individually.

I. Findings of Fact

A hearing was held on June 29 and 30, 1991, wherein

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[1] A copy of the warrant and supporting affidavit is attached to the defendant's Motion to Suppress. (Court File No. 38, Exhibit A).

extensive testimony was heard concerning the procurement and execution of the search warrant at issue. The Court makes the following findings of fact.

Following receipt of information from a confidential informant that a substantial quantity of drugs were located at 2111 Vaden Village Drive, Officer Randy Dunn of the Chattanooga Police Department, Narcotics Division, obtained on March 20, 1991, a search warrant for the premises. Upon issuance of the warrant, Officer Dunn proceeded to the residence and set up surveillance and waited for other officers to arrive in order to execute the warrant. After other officers arrived around 5:30 p.m., they approached the residence. Officer Dunn, along with another officer, went to the back of the residence, while Sgt. Penny and the other officers went to the front entrance. Sgt. Penny and the other officers who went to the front door were wearing either vests or jerseys identifying them in large block letters as POLICE. Sgt. Penny knocked on the front door and announced the officers' presence and their reason for being there. Instead of waiting for an occupant of the residence to let them in, the officers broke down the front door. They did this in response to hearing "Bumrush," followed by the sound of running footsteps.[2] Thus, fearing the destruction of incriminating evidence, the officers forcibly entered the dwelling. After entering the residence, the officers secured the premises within minutes by locating, patting down, and placing all of its occupants in the living room.

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[2] "Bumrush" is a local slang term used to refer to a narcotics raid by law enforcement officers.

Meanwhile, in the back of the residence, Officer Dunn likewise heard the cry of "Bumrush" and the sound of running footsteps. In addition, he heard the sound of someone apparently attempting to crash through one of the back room windows, unsuccessfully. Thereafter, he and the other officer stationed out back entered the residence after it had been secured. Officer Dunn proceeded to one of the back bedrooms where he discovered the defendant handcuffed on the floor. The defendant had been the one attempting to make good his escape through the bedroom window. Before the defendant could negotiate the endeavor successfully, however, one of the officers who entered through the front discovered him. At that time, the defendant was carrying a nine millimeter semi-automatic pistol in his hand, which he dropped when confronted by the officer.

Having secured the premises, the officers then proceeded to search the residence. While other officers would locate items, it was Officer Dunn who made the decision whether to seize a particular item. These items included a large quantity of cocaine in the master bedroom closet which appeared to have been tossed in there. Interestingly enough, this was the same bedroom in which officers found the defendant. Police also found two additional firearms, .44 and .357 caliber revolvers, in the headboard of the bed in that room. Officers also located a number of assorted papers that (1) identified the residents of the premises, (2) linked others to the residence, and/or (3) linked individuals to drug dealing. These papers included bills, receipts, and address/ledger books. In addition, officers searched the occupants. Following such searches, they

found a large amount of cash on four of them or in possessions, *i.e.*, purses belonging to them. Officers found over $4,000 on the defendant's person, in addition to two ounces of heroin.

II. Discussion

A. Probable Cause

Fed. R. Crim. P. 41(c) states that a warrant may issue upon an affidavit sworn to before a federal magistrate or state judge if the magistrate or judge is satisfied that the affidavit reflects probable cause. Probable cause exists where "the facts and circumstances within their [the agents'] knowledge, and of which they had reasonably trustworthy information . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that . . . " a crime has been or is being committed, and that seizable property can be found at the place or on the person to be searched." *Carroll v. United States,* 267 U.S. 132, 162 (1925). Thus,

> [t]he establishment of probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity . . .
>
> Moreover, the existence of probable cause should be determined on the totality of the circumstances.

United States v. Barrett, 890 F.2d 855, 861 (6th Cir. 1989) (quoting *Illinois v. Gates,* 462 U.S. 213, 244 n. 13 (1983). *See Rivera v. United States,* 728 F.Supp. 250, 255 (S.D.N.Y. 1990) ("[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." (quoting *Gates,* 462 U.S. at 235) (quoting *Spinelli v. United States,* 393

U.S. 410, 419 (1969))). Furthermore, a search warrant is presumed valid. *Franks v. Delaware,* 438 U.S. 154, 171 (1978). When reviewing an issuing magistrate or judge's probable cause determination, the Court is to see if there is a "substantial basis for . . . concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." 462 U.S. at 236. This Court will not and should not conduct a *de novo* review of the sufficiency of the affidavit supporting the warrant. *United States v. Davidson,* No. 90-1695, slip op. at 6 (6th Cir. June 18, 1991). The Court, therefore, affords that determination great deference since reasonable minds may differ on the question of whether a particular affidavit establishes probable cause. *United States v. Leon,* 468 U.S. 897, 914 (1984). As stated above, the defendant contends that probable cause did not exist based upon the unknown identity of the Government informant, the alleged falsehoods contained in Officer Dunn's supporting affidavit, and lack of detailed information in the form affidavit itself.

(1) Informant

The law is well settled that the Government may refuse to disclose the identities of its informants at trial. *Roviaro v. United States,* 353 U.S. 53 (1957). Furthermore, the Government is not required to disclose the identity of a confidential informant at a suppression hearing. *United States v. Raddatz,* 447 U.S. 667, 679 (1980); *McCray v. Illinois,* 386 U.S. 300 (1987). As the Supreme Court stated in *Roviaro*

> The purpose of the privilege is in furtherance and protection of the public interest in effective law

> enforcement. The privilege recognizes the obligations of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform this obligation.

Id. at 59. The privilege, however, is not absolute, and where the defendant can show the disclosure is necessary to insure a "fair trial," the informant's identity must be revealed. This can be done when "disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . ." *Id.* at 60-61. A mere request, though is not sufficient, neither is speculation as to the helpfulness or possibility of obtaining relevant, testimony. Disclosure is only warranted when the Court determines that the defendant's need for the information outweighs the Government's claim of privilege. Further, when an informant has not been "an active participant in the events underlying the defendant's potential criminal liability," the balance weighs heavily toward nondisclosure. *Holman v. Cayce,* 873 F.2d 944, 946 (6th Cir. 1989)(quoting *United States v. Sharp,* 778 F.2d 1182, 1187 (6th Cir. 1985) *cert. denied,* 475 U.S. 1030 (1986).

In the present case, the defendant has made absolutely no showing for the need of information that can be supplied solely by revealing the informant's identity. Instead, the defendant merely speculates as the informant's identity and how that may affect his or her credibility and Officer Dunn's reliance upon him or her in seeking a search warrant. *Compare United States v. Silva,* 580 F.2d 144 (5th Cir. 1978). (Where defendant alleged the informant may have a revenge motive,

disclosure was required.). This speculation on the part of the defendant bears more upon the truth or falsity of Officer Dun's statements in his affidavit in support of the warrant that the informant was reliable and credible. As discussed *infra,* the defendant has likewise failed to produce sufficient evidence to even warrant a hearing on this issue. Further, in response to defense counsel's contention that a confidential informant did not exist, the Court conducted an *in camera* interview with Officer Dunn, wherein the Court satisfied itself that such an informant does indeed exist and provided the basis of the information underlying the warrant. Also, the Court found, in addition to all other evidence, that the facts do not justify disclosure of the identity of the informant.

(2) Agent Dunn's Affidavit

There is a presumption of the validity of the affidavit supporting a search warrant. If a defendant wishes to challenge the probable cause for a search warrant by claiming there were false statements in the affidavit supporting the warrant, he must make a substantial preliminary showing that (1) the false statement was made knowingly and intentionally, or with reckless disregard for the truth; and (2) the allegedly false statement is necessary to the finding of probable cause. Only after these two points have been established is the defendant entitled to a hearing. *Franks v. Delaware,* 438 U.S. 154 (1978). The defendant in the present case has made only vague and conclusory allegations of deliberate falsehood or of reckless disregard for the truth. The defendant has made no offer of proof; has not specifically pointed out the statements in the affidavit claimed to be false; and has put forth no supporting

reasons. *United States v. Cummins,* 912 F.2d 98, 100, 101 (6th Cir. 1990); *United States v. Bennett,* 905 F.2d 931, 934 (6th Cir. 1990). The defendant, therefore, is not entitled to a *Franks* hearing.

However, in an abundance of caution, and in response to the defendant's request to reveal the identity of the confidential informant, the Court conducted an *in camera* interview of Officer Dunn. The result of this hearing was a denial of the defendant's request to reveal the identity of the informant. An additional product of this hearing was to give further assurance to the Court that a *Franks* hearing was not warranted. The Court would observe, however, that to a substantial degree the lengthy suppression hearing that was conducted in this case did amount to a *Franks* hearing. This Court is convinced that the affidavit given by Officer Dunn in support of the warrant was not false nor was it made with reckless disregard for the truth.

(3) Form Affidavit

The Fourth Amendment requires that a search warrant "particularly" describe the place to be searched and the persons or things to be seized. The affidavit in question is standardized and provides:

AFFIDAVIT FOR SEARCH WARRANT

SECTION ONE

I, Randy W. Dunn # 527), make oath that I am a (Police Officer), duly appointed and qualified as such in said State and County; that on the (19th) day of (Mar.), 19(91), I received reliable information from (an informant), a

responsible and credible citizen of said State and County, who I, the affiant know to be a responsible and credible citizen because:

CHECK APPLICABLE SECTION

(X) A. Said Informant has given me information in the past that has proven to be reliable,

(X) B. Said Informant has given my fellow officers information in the past that has proven to be reliable,

(X) C. I have known the said informant for (5 yrs.) and know Said Informant to be reliable, honest, credible, and trustworthy,

(X) D. And/or _____,

whose name I have this day disclosed to the Judge to whom this application is made, that (Jane Doe (alias) who resides in or occupies and is in possession of the following described premises, to wit; (211 Vaden Village Dr.) located in (Chatt) Hamilton County Tennessee, unlawfully has in (her) possession on said premises legend and/or narcotic drugs including (cocaine) in violation of law made and provided in such cases.

SECTION TWO

Affiant further states that said informant advised him that (within the last 72 hrs.) 19(91) He, the said informant, was on the said premises of the said (Jane Doe (alias), and while there Said Informant saw legend and/or narcotic drugs including (cocaine), the same being on said premises

in the possession and control of said (Jane Doe (alias).

SECTION THREE

Affiant further states that the Said Informant advised him that Said Informant has seen persons going to and coming from said premises who are believed to be and known generally as users of legend and/or narcotic drugs including (cocaine), and said premises is generally known as a place where legend and/or narcotic drugs including (cocaine), are unlawfully dispensed.

SECTION FOUR

Affiant further states _____.

WHEREFORE, as such officer acting in performance of my duty in the premises I pray that the Court issue a warrant authorizing the search of the person of the said (Jane Doe (alias) and the premises herein described for said legend and/or narcotic drugs including (cocaine), and that such search to be made either day or night.

The defendant attacks the boilerplate descriptions of the informant's reliability, the lack of factual detail regarding the illegal activities alleged, and the lack of independent corroboration. While the affidavit as filled out is sparse as to detail,

> affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or

> negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

United States v. Ventresca, 380 U.S. 102, 108 (1965).

As stated previously, if a judge or magistrate is provided with sufficient information to enable him to make a considered judicial determination of probable cause, a reviewing court will pay substantial deference to that determination. *Aguilar v. Texas,* 378 U.S. 108, 111 (1964). Here the issuing state judge had the sworn affidavit of Officer Dunn stating that his informant had been reliable in the past, both to him and other officers, the name of the informant, a description of the place to be searched, the item sought and the basis for this information. While there is a paucity of detail that is troubling, this Court cannot say that there is not "substantial basis" for the issuing judge to find that a "probability" that criminal activity was occurring at the described premises.

The Court would note, however, that even if the warrant in this case were defective, the defendant's motion to suppress would still be denied. Under *United States v. Leon,* 468 U.S. 897 (1984), this Court finds that the executing officers reasonably relied upon the warrant at issue in conducting their search. First, Officer Dunn used a standard form of affidavit which has been in use for many years by both state and local officers. He had no reason to believe that it was deficient. Second, as previously discussed, this Court conducted an *in camera* interview of Officer Dunn wherein it determined that the information as set forth in the affidavit was correct. Third, this Court, during that interview and testimony during the

hearing held in this matter, ascertained that Officer Dunn also had a substantial amount of additional information not set forth in his affidavit which would have bolstered a probable cause determination.

B. Execution of the Warrant

(1) Time of Execution

Fed.R. Crim. P. 41(c) directs an officer to serve a warrant within 10 days and "in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." Fed. R. Crim. P. 41(h) defines the term "daytime" as the "the hours from 6 a.m. to 10 p.m. according to local time." The evidence adduced at the hearing in this matter clearly shows that the warrant at issue was executed between 5:30 and 6:00 p.m., well within the parameters set out in Rule 41.

(2) Time of Execution

An officer serving a search warrant at a house, absent exigent circumstances, must announce the authority under which he is acting, and the purpose of his call. If the officer is refused admittance to the premises after such announcement, the officer may enter forcibly. 18 U.S.C. § 3109; *United States v. Woodring*, 444 F.2d 749 (9th Cir. 1971). Forcible entries without announcement of purpose and a refusal of admittance have been approved where (1) there would be danger to the officer, (2) there would be danger of flight or destruction of evidence, (3) in situations where a victim or some other person is in peril, or (4) where it would be a useless gesture, such as

when the persons within already knew the officers' authority and purpose. *United States v. Wylie,* 462 F.2d 1178 (D.C. Cir. 1972). *See Der v. California,* 374 U.S. 23, 29 (1963); *United States v. Artieri,* 491 F.2d 440 (2d Cir. 1990), *cert. denied,* 419 U.S. 878 (1974). As set forth in its findings of fact, the Court has determined that officers did in fact sufficiently identify themselves and their reason for being at the residence, and they only entered forcibly after ascertaining that the residence's occupants knew that they were outside and were, apparently, seeking to either flee or possibly destroy incriminating evidence.

(3) Strip Searches

The evidence adduced at the hearing indicates that, while not conducting an all-out strip or body cavity search, police did require at least some persons present to drop or remove their underwear. First, as to the search of those persons other than the defendant, the Court issues no opinion, since none of the evidence which defendant seeks to suppress was found on these individuals. Second, as to evidence found upon the defendant, the Court finds such search to have been reasonable.

In the present case, probable cause existed to arrest the defendant. Not only was he found in the room of the residence containing a substantial quantity of drugs, but he was found attempting to flee with a gun in his possession. In addition, papers not only linking the defendant to the premises but drug trafficking in general were also found. Thus, officers conducted a valid search incident to the defendant's arrest. *Michigan v. DeFillippo,* 443 U.S. 31 (1979); *Chimel v. California,* 395 U.S.

752 (1965). Further, such search was reasonable in light of testimony that persons dealing in drugs often attempt to hide the drugs in their underwear.

(4) Weapons and Personal Papers

Defendant contends that officers exceeded the scope of the warrant by seizing weapons and personal papers found in plain view during their search for drugs. First, the Court notes that the officers had a right to search in those places where they would likely find the cocaine described in the warrant. *Coolidge v. New Hampshire,* 403 U.S. 443, 517 (1971). Second, the Fourth Amendment does not prohibit the warrantless seizure of items found in plain view during the lawful search for different items, even if such discovery was not inadvertent. *Horton v. California,* 110 L.Ed.2d 112, 126 (1990). Third, under *Terry v. Ohio,* 392 U.S. 1 (1968) and *Michigan v. Long,* 463 U.S. 1 (1983) and their progeny, the officers may search for weapons when the officers reasonably believe that the area subject to the protective sweep harbors an individual posing danger to the officers or others. In *Terry v. Ohio,* the Supreme Court authorized a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief based on specific and articulable facts that the person with whom is dealing is armed and dangerous. In *Michigan v. Long,* the Supreme Court extended the principles of *Terry* to the search of the passenger compartment of an automobile, thus authorizing a frisk of an automobile. Lastly, in *Maryland v. Buie,* 108 L.Ed.2d 276 (1990), the Supreme Court applied this

same analysis to authorize a "sweep" of a house when there are

> articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Id. at 286.

Clearly, under the plain view doctrine, the discovery and seizure of the weapons and personal papers is reasonable and lawful. Further, the discovery and seizure of the weapons is also authorized under the Supreme Court's protective sweep analysis. In fact, the testimony at the hearing revealed that (1) officers found an individual hiding behind a shower curtain in a bathroom and (2) guns were found which would have been easily accessible. Lastly, the Court would note that those items seized were done so because they were (1) direct evidence of a crime, (2) evidence tying particular individuals to the residence, or (3) evidence tying particular individuals to drug trafficking. Thus, their seizure is permitted under the Fourth Amendment.

The defendant's motion to suppress is, therefore, DENIED.

SO ORDERED
ENTER:

R. ALLAN EDGAR
UNITED STATES DISTRICT COURT JUDGE